**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN**

SIERRA CLUB,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. Action No. 3:10-cv-000303-bbc
	)	
DAIRYLAND POWER COOPERATIVE,	)	
	)	
Defendants.	)	
	)	

DAIRYLAND'S REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

Dairyland files this reply in response to an argument newly raised in Sierra Club's

opposition brief, which Sierra Club had failed to advance during the parties' meet and confer.

Sierra Club now asserts that discovery of Dairyland's Section 114 response to EPA is relevant to

its opacity violation claim because "to know which opacity limit applies, Plaintiff needs to know

what physical or operational changes occurred at DPC's plants." Doc. No. 26 at 4; Doc. No. 27

at 2-3; *see also* Wis. Admin. Code §§ NR 431.04, NR 431.05 (limiting sources to 40% and 20%

opacity, respectively). Prior to its response, Sierra Club never indicated that it disputed the

levels of the opacity limits in Dairyland's permits issued by the Wisconsin Department of

Natural Resources. Sierra Club is wrong for two reasons.

First, one need only look at the applicable operating permits to see what opacity limit

applies to the Dairyland plants. Indeed, Sierra Club's Complaint alleged that "the smoke emitted

from the stacks at the Alma/Madgett and Genoa plants violated [opacity] limits" as set forth in

Dairyland's permits. Doc. No. 1 at ¶¶ 101; *id.* at 35-40 (specifying opacity limits contained in

Dairyland's permits for each Unit). Sierra Club's argument for the relevance of the Section 114

production to its opacity claim is therefore not supported by its Complaint.

Second, Sierra Club's argument – suggesting that the opacity limits Wisconsin incorporated into the applicable operating permits are incorrect – represents an impermissible collateral attack upon a facially valid state permit. Such collateral attacks on state permits under the guise of a citizen suit against a permittee are improper as a matter of law. *See, e.g.*, *Nat'l Parks Conservation Ass'n v. Tenn. Valley Auth.,* 175 F. Supp. 2d 1071, 1079 (E.D. Tenn. 2001) (dismissing citizen suit alleging violations of opacity limits for a TVA facility, notwithstanding that each of the alleged "violations" was allowed by the facility's operating permit and holding that "the Clean Air Act provides no cause of action for a citizen suit collaterally attacking a permit issued by a State's enforcement agency"). Thus, the non-Complaint projects are not relevant to Sierra Club's opacity claims, and Sierra Club's overbroad requests should be limited. Accordingly, Dairyland's motion for protective order should be granted.

Respectfully submitted this 15th day of October, 2010.

By:

/s/**Nash E. Long, III**

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing **DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER** with the Clerk of the Court using the CM/ECF system that will send notification of such filing automatically to all counsel of record.

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This 15th day of October, 2010.

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4